No. 03-17-00812-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HEBERT, JOSEPH "MIKE" HEBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH

Appellants/Cross-Appellees,

&

STATE OF TEXAS

Intervenor,

v.

CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN

Appellees/Cross-Appellants.

From the 53rd Judicial District Court, Travis County, Texas
Cause No. D-1-GN-16-002620

CITY OF AUSTIN AND MAYOR STEVE ADLER'S MOTION FOR *EN BANC* RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES ON REHEARING v

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 3

I. The Majority's decision undermines the City's zoning power and has broad implications beyond this case 3

II. The ban on non-homestead short-term rentals is not retroactive 5

A. There is no settled expectation in renting non-homestead property for short terms 5

B. The ban operates prospectively, not retroactively 7

III. Even if the ordinance were retroactive, it is constitutional 8

A. The ban on short-term rentals serves a strong public interest 9

B. The right impaired by the ban on short-term rentals is narrow 12

C. The ban on short-term rentals is only a small impairment of the right to use property 12

IV. The restrictions on conduct at short-term rental properties do not violate the Assembly Clause 14

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

Ex parte Abell,
613 S.W.2d 255 (Tex. 1981)..... 5

Barshop v. Medina Cnty. Underground Water Conservation Dist.,
925 S.W.2d 618 (Tex. 1996)..... 10

City of Brookside Vill. v. Comeau,
633 S.W.2d 790 (Tex. 1982)..... 5

City of Pharr v. Tippitt,
616 S.W.2d 173 (Tex. 1981)..... 11

City of San Antonio v. Arden Encino Partners, Ltd.,
103 S.W.3d 627 (Tex. App.—San Antonio 2003, no pet.)..... 6, 7, 11

City of University Park v. Benners,
485 S.W.2d 773 (Tex. 1972)..... 6, 7, 10, 12

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994)..... 6, 9

Mayhew v. Town of Sunnyvale,
964 S.W.2d 922 (Tex. 1998)..... 11, 15

Mbogo v. City of Dallas,
No. 05-17-00879-CV, 2018 WL 3198398
(Tex. App.—Dallas June 29, 2018, pet. denied) (mem. op.)..... 6-8, 14

Middleton v. Texas Power & Light Co.,
185 S.W. 556 (Tex. 1916)..... 6

Robinson v. Crown Cork & Seal Co.,
353 S.W.3d 126 (Tex. 2010)..... 5, 8-11

Sheffield Dev. Co. Inc. v. City of Glenn Heights,
140 S.W.3d 660 (Tex. 2004)..... 14

Tenet Hosps. Ltd. v. Rivera,
445 S.W.3d 698 (Tex. 2014)..... 4, 13

Zaatari v. City of Austin,
No. 03-17-00812-CV, 2019 WL 6336186 (Tex. App.—Austin
Nov. 27, 2019, no pet. h.) ..... *passim*

Weatherford v. City of San Marcos,
157 S.W.3d 473 (Tex. App.—Austin 2004, pet. denied) 5

White Deer I.S.D. v. Martin,
__ S.W.3d __, No. 07-18-00193-CV, 2019 WL 5850378
(Tex. App.—Amarillo Nov. 5, 2019, no pet. h.). 13

Williamson Pointe Venture v. City of Austin,
912 S.W.2d 340 (Tex. App.—Austin 1995, no writ) 5-7

Constitution and Rules

TEX. CONST. ART I, § 27..... 15

TEX. R. APP. P. 41.2(c)..... 4

ISSUES ON REHEARING

1. Does the Majority's decision that the City of Austin's zoning ordinance that bans certain short-term rentals is unconstitutional violate long-standing zoning and Retroactive Clause jurisprudence?

2. Is the Majority's decision that the City of Austin's regulation of certain activities at short-term rental properties is unconstitutional supported by the Assembly Clause?

TO THE HONORABLE THIRD COURT OF APPEALS, *EN BANC*:

The City of Austin and Mayor Steve Adler, (jointly "City of Austin"), respectfully file this motion for reconsideration *en banc.*

INTRODUCTION

The Majority's decision undermines the City of Austin's zoning authority. The Majority held that a zoning ordinance that banned certain leases on residential properties was an unconstitutional retroactive law. In reaching its holding, the Majority construed a mere existing use of property as a constitutionally protected "settled expectation." This is contrary to decades of zoning and retroactivity jurisprudence. In fact, another court of appeals recently rejected the same "settled expectation" argument that the Majority adopts here.

Further, the Majority's "settled expectation" analysis applies beyond this case and opens the door for a retroactivity challenge to any new law where there is a mere existing use of property.

The Majority also broadly construes fundamental rights and the protections afforded by the Assembly Clause to protect non-peaceable gatherings that have nothing to do with the common good.

Because the Majority's refusal to follow long-standing Texas law and in light of the existence of a comprehensive dissent, the City of Austin seeks *en banc* review by this Court.

BACKGROUND

This case challenges the City of Austin's 2016 short-term rental regulations. After a comprehensive study conducted over a five-year period, that included public hearings and legislative deliberation, the City of Austin changed its zoning ordinances to: 1) ban one-type of short-term rental—non-owner occupied properties with lease terms of less than 30 days, [§25-2-950], and 2) restrict certain conduct at short-term rentals relating to outdoor gatherings. [§25-2-795].

The State and Property Owners raised constitutional challenges to the ordinance and sought summary judgment. The trial court denied the Property Owners and the State's motions for summary judgment and granted the City's no-evidence motion for summary judgment.

In this Court, the Majority reversed and held that the ban on non-homestead short-term rentals is an unconstitutional retroactive law and that the restrictions on short-term rentals are unconstitutional under the Assembly Clause. Justice Kelly dissented.

The Dissent determined that the ban was not retroactive, and if it were, it served a strong public interest with only a slight impairment on property owners and was thus constitutional. The Dissent further concluded that the ordinance's restrictions related to non-peaceable gatherings that are not protected by the Assembly Clause.

ARGUMENT

I. The Majority's decision undermines the City's zoning power and has broad implications beyond this case.

The City of Austin asks this Court sitting *en banc* to adopt the analysis and holding urged by the Dissent. It makes this request for the following reasons: The Majority's broad and unprecedented "settled expectation" analysis and its holding that the ordinances are unconstitutional undermines the City of Austin's future zoning authority.

The City of Austin exercised its zoning authority to ban one type of short-term rental after gathering evidence from those for and against short-term rental regulations. The evidence revealed numerous negative effects that short-term rental properties were causing relating to public health, public safety, and the general welfare. Appe. Br. 6-8 (discussing evidence with record citations).

The Majority's decision will have broad repercussions and undermine the City of Austin's zoning authority in all areas not just with short-term rental regulation. Under the Majority's analysis, a constitutional retroactivity challenge could be based on a mere existing use of property or the expectation of the continuance of an existing law.

This is contrary to longstanding zoning and retroactive law precedent, and in direct conflict with a decision from the Dallas Court of Appeals.

The Majority expands fundamental rights analysis well beyond Texas Supreme Court precedent of requiring settled expectation—not a mere expectation that an existing law will continue—to support a retroactive challenge.

As the Dissent observes, the Majority's decision to strike a zoning ordinance on retroactivity grounds is unprecedented. The Texas Supreme Court has held a law unconstitutionally retroactive only four times since 1887. (Dissent at 2) (citing *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 708 (Tex. 2014)). In its most recent retroactive-challenge cases, the supreme court upheld the challenged laws. (Dissent at 3.) According to the Dissent, "[n]ever has the [supreme] Court struck down a zoning or property-use law as unconstitutionally retroactive, though Texas municipalities have been zoning and regulating property for decades." (Dissent at 3.)

The Majority struck another provision of the zoning ordinance as violating the Assembly Clause when the ordinance on its face has nothing to do with the right to peaceably assemble for citizens' common good. In doing so, the Majority expands fundamental-rights jurisprudence.

The Majority's failure to follow long-standing Texas law and its effect on a municipality's broad zoning authority, are "extraordinary circumstances" upon which the City of Austin makes its request for *en banc* reconsideration. *See* TEX. R. APP. P. 41.2(c).

II. The ban on non-homestead short-term rentals is not retroactive.

The protection against retroactive laws is not implicated here because: 1) there is no settled expectation in using non-homestead property as a short-term rental, and 2) the ordinance operates as a prospective change in use.

A. There is no settled expectation in renting non-homestead property for short terms.

The protection against retroactive laws requires the existence of a *settled expectation*, that is, "more than a *mere expectation* as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable . . . ." *Ex parte Abell*, 613 S.W.2d 255, 261 (Tex. 1981) (emphasis added); *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010).

Without support, the Majority characterizes the ability to lease non-homestead property for short terms as a "well-established and settled property right[s] that existed before the ordinance's adoption" to support its conclusion that the ordinance is retroactive. (Majority at 17.)

The City of Austin's broad zoning power, however, negates any settled expectation. Zoning allows a "municipality, in the exercise of its legislative discretion, to restrict the use of private property." *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 484 (Tex. App.—Austin 2004, pet. denied) (quoting *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982)). As this Court

previously held, a city can "rezone the property to entirely prohibit previously permissible uses, even established uses." *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 343 (Tex. App.—Austin 1995, no writ).

The Texas Supreme Court held more than 45 years ago that "property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made." *City of University Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972); *see also City of San Antonio v. Arden Encino Partners, Ltd.*, 103 S.W.3d 627, 630 (Tex. App.—San Antonio 2003, no pet.) (property owners do not have a vested interest in particular zoning classifications; city may rezone as public necessity demands).

As the Dissent observed, a law is not retroactive simply because it applies to conduct that existed before the law's enactment or if it "upsets expectations based in prior law." (Dissent at 3) (citing *Mbogo v. City of Dallas*, No. 05-17-00879-CV, 2018 WL 3198398, at *4 (Tex. App.—Dallas June 29, 2018, pet. denied) (mem. op.); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994)). "No one has a vested right in the continuance of present laws in relation to a particular subject . . . . There cannot be a vested right, or a property right, in a mere rule of law." *Middleton v. Texas Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916).

"This is true particularly in the area of zoning regulations, for, there, 'strong policy arguments and a demonstrable public need' support municipalities' 'fair and

reasonable termination of nonconforming property uses.'" (Dissent at 3) (citing *Mbogo*, 2018 WL 3198398, at *4 (quoting *Benners*, 485 S.W.2d at 778). "Established law provides that no property owner has a vested interest in particular zoning categories." *Williamson Pointe*, 912 S.W.2d at 343. Otherwise, "a lawful exercise of the police power by the governing body of the city would be precluded." *Id.* (quoting *Benners*, 485 S.W.2d at 778).

As the Dissent observes, the Majority's conclusion that there is a settled expectation in short-term rentals "expand[s] the scope of fundamental property rights to include a tenant's use of a non-homestead property for a lease term of less than 30 days [and] wields fundamental-rights jurisprudence in a way that cannot comport with what the Fifth Court of Appeals held in *Mbogo*. And it finds no support in Texas Supreme Court jurisprudence or that of this Court's 127-year history." (Dissent at 5.)[1]

B. The ban operates prospectively, not retroactively.

Further, the ban on non-homestead short-term rentals is not retroactive. Instead, the challenged ordinance operates prospectively. The Majority's decision is in stark contrast to an opinion from the Dallas Court of Appeals on a similar retroactive challenge.

[1] The continued use of property as a short-term rental is even more removed from an "expectation." A short-term rental license is an annual, renewable permit, subject to non-renewal or suspension for failure to pay fees or operator misconduct.

In *Mbogo*, the City of Dallas changed zoning to eliminate Mbogo's use of his property as an auto repair shop. Mbogo claimed the ordinance was an unconstitutional retroactive law under Texas Constitution Article I, § 16. The Dallas Court relied on *Benners* and concluded the ordinance was not retroactive. Mbogo did "not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made." *Mbogo*, 2018 WL 3198398, at *5-6.

The Dissent points out that the Dallas Court concluded that the rezoning was not retroactive even though Mbogo would have to discontinue his business that he had operated before the rezoning. (Dissent at 4.) "The ordinance did not change any use in the property thereby attaching a new legal consequence or upset any expectations based in prior law. Rather, it *prospectively* altered a property owner's future use of the property by setting a date by which to come into compliance." *Mbogo*, 2018 WL 3198398, at *4 (emphasis added); (Dissent at 4.)

That is precisely the situation with City's ordinance ban on short-term rentals of non-homestead properties. (Dissent at 4-5.) The Majority opinion does not address *Mbogo* although the City of Austin cited the case in its brief.

III. Even if the ordinance were retroactive, it is constitutional.

The Texas Supreme Court held in *Robinson*, "mere retroactivity is not sufficient to invalidate a statute . . . Most statutes operate to change existing

conditions, and it is not every retroactive law that is unconstitutional." *Robinson*, 335 S.W.3d at 139. Retroactive laws often serve legitimate purposes, including, "to correct mistakes." *Landgraf*, 511 U.S. at 267-68.

In *Robinson*, the Texas Supreme Court established the following three factors to consider if a law is unconstitutionally retroactive: 1) the nature and strength of the public interest served by the law as evidenced by legislative findings, 2) the nature of the prior right impaired by the law, and 3) the extent of the impairment. *Robinson*, 335 S.W.3d at 145.

A. The ban on short-term rentals serves a strong public interest.

The ordinance is rationally related to legitimate governmental purposes. The City of Austin enacted the ordinance after an almost five-year period of consideration, investigation, public hearings, and staff and elected officials' comments that all demonstrated the need for further regulation and eventual termination of certain short-term rentals. Appe. Br. 6-8 (discussing evidence with record citations).

The evidence gathered showed numerous concerns for public health, safety, and the general welfare. For example, the over-occupancy in short-term rentals affects the sewage system and creates fire hazards. Short-term rental owners/tenants failed to maintain the rental properties that negatively impacted

historic neighborhoods. Finally, there were public-safety concerns relating to strangers in neighborhoods, public intoxication, loud music, and parking issues.

The Majority characterized these public welfare concerns as "slight," and concluded that there was no compelling public interest to ban short-term rentals. According to the Majority, there is no public interest served because other laws address some of the stated concerns and, further, the City of Austin issued only ten notices of violation of the challenged ordinance. (Majority at 18-21.)

According to the Dissent, the City of Austin's interests in banning short-term rentals are within the "wide zone of strong public interest." (Dissent at 6.) "Strong policy arguments and a demonstrable public need" support "the fair and reasonable termination of nonconforming property uses," and "[m]unicipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of the police power." (Dissent at 5) (*Benners*, 485 S.W.2d at 778.) Further, "efforts to 'safeguard the public safety and welfare' are sufficiently strong public interests under the Retroactivity Clause." (Dissent at 6) (citing *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996)).

In contrast to the Majority's questioning the number of incidents (10) where the City of Austin issued notices of violation to short-term rentals, the Dissent points out that courts are not to determine whether a law is "the only, the best, or

even a good way" to achieve the stated public interest. (Dissent at 6) (quoting *Robinson*, 335 S.W.3d at 146.) "The necessity and appropriateness of legislation are generally not matters the judiciary is able to assess." *Robinson* 335 S.W.3d at 146. The existence of a sufficiently strong public interest ends the inquiry. (Dissent at 6.)

Further, if there is a difference of opinion on whether a zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, then the ordinance stands as a valid exercise of the city's police power. *Arden Encino Partners, Ltd.*, 103 S.W.3d at 630 (citing *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981)). The Texas Supreme Court has instructed that, "[Z]oning decisions are vested in the discretion of municipal authorities; courts should not assume the role of a super zoning board." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998).

Finally, the deferential inquiry applied in zoning disputes does not focus on the ultimate effectiveness of the ordinance. *Id.* at 938. Instead, the inquiry looks to whether the municipality could have rationally believed that the ordinance would promote its objectives. *Id.*

B. The right impaired by the ban on short-term rentals is narrow.

The Majority again relies on its characterization of the lease of non-homestead property for short terms as a "settled expectation" to conclude that the right impaired is substantial. (Majority at 21-23.)

As the Dissent counters, even if the right to lease were a settled right, there is no settled expectation to a short-term rental of a non-homestead property. (Dissent at 7.) The Majority acknowledged that nothing prevents the City of Austin from regulating the use of property, including restrictions on leasing. (Dissent at 7; Majority at 22.) The Texas Supreme Court held decades ago, "property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made." *Benners*, 485 S.W.2d at 778.

Contrary to the Majority's decision, the ban is narrow. The ban only ends one use of property—leases of non-homestead properties for less than 30-day rental terms. There is no ban on 30-day or longer rentals. There is no prohibition against an owner making a property her homestead and leasing it for less than 30-day terms.

C. The ban on short-term rentals is only a small impairment of the right to use property.

Again, the Majority relies on its characterization of leasing non-homestead property for short terms as a settled right and concludes the ban significantly

impacts that right by causing a loss of income. (Majority at 23.) The Majority overlooks the grace period and its effect on the retroactivity analysis.

The amount of an impairment is largely influenced by the existence of a grace period. As the Dissent observed, Texas Supreme Court has held that "impairment of [] a right may be lessened when a statute affords a plaintiff a grace period." *Tenet*, 445 S.W.3d at 708. The Texas Supreme Court has upheld statutes in retroactivity challenges with shorter grace periods than the one here. (Dissent at 7); *Tenet*, 445 S.W.3d at 708. The Amarillo Court recently observed that time to mitigate investment loss renders any impairment "slight." *White Deer I.S.D. v. Martin*, __ S.W.3d __, No. 07-18-00193-CV, 2019 WL 5850378, at *8 (Tex. App.—Amarillo Nov. 5, 2019, no pet. h.).

While the staggering rise in property values across Austin makes it difficult to conceive of a realistic loss of investment on residential property, nevertheless, the ordinance contains a generous six-year grace period—until April 2022—to allow property owners time to recoup any loss of investment. Further, the Dissent observed that there was no showing that the owners here could not recoup their investment before April 2022. (Dissent at 8.)

The Majority also misstates the controlling consideration under the third factor of *Robinson*. The Majority focuses on the "loss of income" for owners of

type-2 short-term rental properties. (Majority at 23.) But loss of investment is the touchstone, not loss of income. (Dissent at 8.).

As the Dallas Court held, the issue is protecting an investment, loss of income is not enough. *Mbogo*, 2018 WL 3198398, at *7. The Texas Supreme Court has instructed that when a city adopts a zoning ordinance that limits a property owner's prospective expectations of profit, it does not violate the constitution so long as the regulation furthers, as here, a legitimate governmental interest. *See Sheffield Dev. Co. Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 677-79 (Tex. 2004).

As the Dissent concluded, a reduction in profit does not equate to an unconstitutional impairment of a property right. (Dissent at 8.) Thus, the Dissent correctly concluded that any impairment is slight. (Dissent at 7-8.)

Accordingly, under *Robinson*, even if the ban on non-homestead short-term rentals were construed as retroactive, the ordinance is nevertheless constitutional.

IV. The restrictions on conduct at short-term rental properties do not violate the Assembly Clause.

The property owners challenged the ordinance's restrictions on short-term rentals relating to occupancy and outdoor gatherings. [§25-2-795] The Majority applied a strict-scrutiny review to conclude that the restrictions violated the Assembly Clause. (Majority at 42.)

Unlike the Majority, the Dissent applied at rational-basis review to the challenged zoning ordinance. (Dissent at 14, 16) (citing *Mayhew*, 964 S.W.2d at 939 (zoning decisions are afforded only a rational relation scrutiny)). The Dissent cautioned of the implications of the Majority's heightened review. (Dissent at 14.) According to the Dissent, "the effect of the majority opinion's view is that any regulation affecting any activity, anywhere in Texas, is subject to strict-scrutiny review so long as more than one person is involved. This view will have exactly the kind of far-reaching effects that the Retroactivity Clause would have had if the Supreme Court had not prevented it from being interpreted overly literally." (Dissent at 14.)

The Dissent further observed that the Assembly Clause is not as broad the Majority concludes. According to the Dissent, the Majority declared a fundamental right to congregate without considering the plain text of the clause. (Dissent at 12-14.) The Assembly Clause only protects gatherings that are peaceable and for the citizens' common good. TEX. CONST. ART. I, § 27; (Dissent at 12-14.)

Contrary to the Majority opinion, the clause does not "recognize an unfettered right to assemble for whatever purpose and in whatever manner at whatever time of day, as the majority opinion suggests. It instead limited that right to assemble in two important ways: it must be peaceable, and it must be for the

citizens' common good." (Dissent at 10.) The Assembly Clause "goes hand in hand with freedom of speech." (Dissent at 11.)

On its face, the challenged zoning ordinance has nothing to do with conduct protected by the Assembly Clause or the First Amendment. Instead, the ordinance seeks to prohibit "non-peaceable assemblies disconnected from citizens' common good." (Dissent at 11.) The record established that the ordinance protected against non-peaceable assembly that had nothing to do with civic discourse warranting protection: loud noise, public disturbances, and threats to public safety. (Dissent at 13-14.)

The restrictions are assembly-neutral zoning regulations that have a rational basis. (Dissent at 11-12.)

Thus, the Dissent concluded that the City of Austin's restrictions on short-term rentals are rationally related to public interest of health and safety and did not impinge on any right to peaceably assemble to advocate for the common good. (Dissent at 17-18.)

CONCLUSION

Appellees/Cross-Appellants City of Austin and Mayor Steve Adler respectfully request that the Court grant this motion for *en banc* reconsideration, vacate the Panel's opinion and judgment, and issue a new opinion. This Court should affirm the judgment of the trial court and render judgment that the challenged ordinances are constitutional.

Respectfully submitted,

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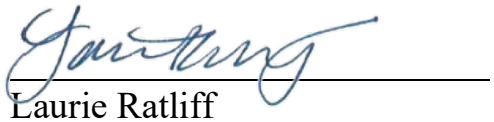
CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion for *En Banc* Reconsideration contains a total of 3,426 words, excluding the parts exempted under Texas Rule of Appellate Procedure 9.4(i)(1), as verified by Microsoft Word 2013. This Petition for Review is therefore in compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(D).



Laurie Ratliff

CERTIFICATE OF SERVICE

I certify that *Appellees/Cross-Appellants City of Austin and Mayor Steve Adler's Motion for En Banc Reconsideration* was served on Appellants/Cross-Appellees as indicated below in accordance with the Texas Rules of Appellate Procedure 9.5(e) on this 13th day of January 2020, via e-service:

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